Supreme Court, U.S.
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No. 90-1870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WISHING WELL LIMITED PARTNERSHIP,
Petitioner,
v.
SECURITY PACIFIC BUSINESS FINANCE, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the order lifting the automatic stay was void, and if so, whether the Bankruptcy Court abused its discretion by denying Petitioner's motion to vacate that order.

2. Whether there is any exception to the appellate mootness doctrine, in the context of foreclosure sales, where applicable state law does not allow post-foreclosure redemption.

LIST OF ALL PARENT COMPANIES

Respondent's name in the courts below was "Security Pacific Business Finance, Inc.", not "Security Pacific Business Finance Company."

Respondent's present name is Security Pacific Credit Corporation.

Respondent is 100% owned by Security Pacific Financial Services System, Inc.

Security Pacific Financial Services System, Inc. is 95% owned by SP Financial Services Holdings, Inc. and 5% owned by The Mitsuitaiyo Kobe Bank, Limited.

SP Financial Services Holdings, Inc. is 100% owned by Security Pacific Corporation.

Respondent has no subsidiary companies.

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STATEMENT OF THE CASE

Petitioner filed this bankruptcy case the week before the scheduled foreclosure of its sole asset, an apartment complex located in Georgia. As stated in the Petition for Writ of Certiorari ("Petition"), Respondent filed a motion for relief from stay on March 16, 1989. At page 3 of the Petition, Petitioner states that it never received timely notice of the hearing on that motion and further states that Respondent has "admitted as much" in its pleadings below, citing Appendix 7, pp. 10-11. That allegation is factually incorrect; no such admission, nor anything resembling such an admission, was made by Respondent in the cited brief or in any other pleading.

Respondent's motion for relief from stay ("the Stay Motion") and the notice of hearing thereon were served by first-class mail upon Petitioner's counsel of record at the address given in Petitioner's bankruptcy petition. Petitioner's Appendix 5-2. The certificate of service of those papers states they were deposited in the U.S. Mail on March 16, 1989, the date the motion was filed. Petitioner has never denied that its counsel timely received those papers. The hearing was scheduled for April 3, 1989 (Petitioner's Appendix, 5-2), in accordance with the time requirements of 11 U.S.C. § 362(e).

The president and secretary of Petitioner's corporate general partner were attorneys at a certain law firm. Petition, p. 2. Petitioner's counsel of record, on whom the Stay Motion and notice of hearing were served, was also an attorney at that same firm. Petition, p. 3. In fact, all three occupied the same floor in the same building. Petition, p. 12.

Three days prior to the hearing, Respondent's counsel personally spoke with the secretary of Petitioner's corporate general partner about the upcoming hearing. *Id.* Petitioner did not appear at the hearing.

The order lifting the automatic stay ("the Stay Order") was signed on April 7, 1989 and entered on the docket by the clerk on April 11, 1989. Petitioner did not appeal from the Stay Order.

At 4:46 p.m. on the day before the scheduled foreclosure sale, approximately four weeks after the hearing on the Stay Motion, Petitioner filed a "Motion to Vacate Order Vacating Automatic Stay Entered April 11, 1989 Pursuant to Bankruptcy Rule 9024 and Federal Rule of

Civil Procedure 60(b)(4)" ("the Rule 60(b) Motion"). At the hearing the following day on that motion, the Bankruptcy Court orally denied the motion. A written order subsequently was entered. It is the denial of Petitioner's Rule 60(b) Motion which is the ultimate subject of Petitioner's request for certiorari.

SUMMARY OF THE ARGUMENT

Although Petitioner attempts to phrase the issue in terms of the propriety of the issuance of the Stay Order, that question is not properly before this Court. Petitioner never appealed from the Stay Order and it is now final and unappealable. The order giving rise to the Petition is the order denying Petitioner's Rule 60(b) Motion. The issue, therefore, is whether the Bankruptcy Court erred in its application of Rule 60(b). That rule endows the court with discretion and the Bankruptcy Court was well within its discretion in refusing to vacate the Stay Order. Petitioner's argument that the service of a motion on the attorney who represents a party is insufficient to comply with the requirements of due process of law is not supported by logic or legal authority. More importantly, acceptance of that argument would be tantamount to a holding that the method for service specifically prescribed by the Federal Rules of Civil Procedure and most, if not all, of the state rules of civil procedure, is unconstitutional.

In an effort to set forth a controversy worthy of this Court's consideration, Petitioner alleges that there is a conflict between decisions of the Eleventh and Ninth Circuits. As shown below, there is in fact no conflict between the decisions of those circuits; the same result

would have been reached whether this case had originated in either circuit.

ARGUMENT AND CITATION OF AUTHORITY

I. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE ELEVENTH AND NINTH CIRCUITS AS TO THE "MOOTNESS RULE"

In an effort to set forth a dispute worthy of this Court's review on writ of certiorari, Petitioner argues at pp. 6-9 of its Petition that there is a conflict between the decisions of the Eleventh Circuit, on the one hand, and decisions of the Ninth Circuit and two Texas district courts, on the other, regarding the so-called "mootness rule." Petitioner admits that "a body of law has grown up, in the Eleventh Circuit and elsewhere, which holds that an appeal is moot after a foreclosure sale has occurred, since the court then can offer no effective relief." Petition, p. 6. Petitioner goes on to state, incorrectly, that the rule is designed to protect "an innocent third party purchaser." As shown below, even the Ninth Circuit decision endorsed by Petitioner rejects that rationale. The true rationale for the mootness rule has been stated as follows: "The rule does not distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of the bankruptcy court that have not been stayed pending appeal...." *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1554 (11th Cir. 1988), *quoting Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir. 1981).

Petitioner next contends that circuit courts of appeal are split on whether there should be an exception to the

mootness rule. The Ninth Circuit decision on which Petitioner primarily relies is *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987). In *Sun Valley*, the Ninth Circuit began its discussion of the mootness rule by stating, "We have generally held that where an automatic stay is lifted, the debtor's failure to obtain a stay pending appeal renders an appeal moot after assets in which the creditor had an interest are sold." 823 F.2d at 1374, *citing Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1423-24 (9th Cir. 1985). The Ninth Circuit went on to say that it had carved out a "narrow exception" to that rule, where real property is sold to a creditor who is a party to the appeal. 823 F.2d at 1375. It then stated that this exception to the rule "is especially appropriate here, where the foreclosure sale is subject to statutory rights of redemption." *Id.* The Court admitted that the fact that the purchaser at foreclosure is a party to the appeal does not change the applicability of the mootness rule, citing *Algeran, supra.* Instead, the Court grounded its holding on statutory rights of redemption. "Based on equitable principles, redemption has long provided a means for reversing sales of real property." *Id.*

Less than one year after its decision in *Sun Valley*, the Ninth Circuit clarified that decision in *In re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988). After first endorsing the wisdom of the mootness rule, the Ninth Circuit commented on the exception to that rule discussed in its prior decision in *Sun Valley*, stating, "In *In re Sun Valley* we noted that this exception for real property sold to a party-creditor is especially appropriate 'where the foreclosure sale is subject to statutory rights of redemption.'" 846 F.2d at 1172-73 (citation omitted). The

Court then stated, "This makes sense. To the extent that a sale is subject to rights of redemption, the sale is not truly final." *Id.* at 1173. Citing with approval the decisions of the Eleventh, Tenth and First Circuits, the Court stated, "No such justification supports a broader exception for all real property sold to a creditor who is a party to the appeal. Other circuits have not permitted a mootness exception under these circumstances." *Id.* "Accordingly, we endorse *In re Sun Valley*'s suggested limit to the mootness doctrine. The exception is available when real property is sold to a creditor who is a party to the appeal, *but only when the sale is subject to statutory rights of redemption.*" *Id.* (emphasis added).

In sum, the only circuit described by Petitioner as being in conflict with the Eleventh Circuit has limited its exception to the mootness rule to those cases where state law provides a right of redemption after the foreclosure sale. No such right of redemption exists under Georgia law, the law which governs both the foreclosure sale and the security instrument at issue in this action. *See* G. PINDAR, GEORGIA REAL ESTATE LAW, § 21-61 (3d ed. 1986) ("At any time prior to the foreclosure sale, a tender of the full amount of the indebtedness will suffice to relieve a default and revest title in the grantor. Georgia law confers no subsequent redemption period after the sale such as may be found in many other states....").

At pp. 8-9 of the Petition, Petitioner cites two cases from district courts in Texas which also endorse a limited exception to the mootness doctrine, which Petitioner expressly admits includes the requirement of a statutory post-foreclosure right of redemption. For example, in one of the cases cited by Petitioner, *In the Matter of First*

Mortgage Atrium Building, Ltd., 92 B.R. 202 (E.D. Tex. 1988), the Court specifically endorsed the reasoning of the Ninth Circuit in *Onouli, supra*, stating, "It is essential that any exception to the mootness rule require the existence of a statutory right of redemption." 92 B.R. at 206.

Thus, all of the decisions upon which Petitioner relies based their exception to the mootness rule upon the existence of a post-foreclosure right of redemption. No such right exists under the law applicable to this case. Not only is there no conflict between the circuits, but the Ninth Circuit has expressly endorsed the holdings of the Eleventh Circuit. The result in this case would have been the same whether this case had been decided by the Ninth Circuit, the Texas district courts, or, from all that appears in the Petition, the courts in any other jurisdiction. Were this Court to grant certiorari, it would be treating a non-existent conflict and would be rendering an advisory opinion which could not possibly alter the results in the courts below.

II. THE ELEVENTH CIRCUIT PROPERLY INTERPRETED THE GOVERNING LAW

Petitioner argues at pp. 9-15 of the Petition that the Eleventh Circuit's decision should be reversed because Petitioner did not receive proper notice of the Stay Motion. That is not truly the issue here.

As stated previously, this is not an appeal from the Stay Order. Petitioner never filed an appeal from the Stay Order. Under Bankruptcy Rule 8002(a), the Stay Order became final and unappealable on the eleventh day after it was entered. The bankruptcy court order which is the ultimate subject of Petitioner's proposed writ of certiorari is

an order denying its motion to vacate the Stay Order brought pursuant to Bankruptcy Rule 9024, which incorporates, with certain exceptions not applicable here, Fed.R.Civ.P. 60. More specifically, Petitioner's motion was based upon subsection (b)(4) of Rule 60. That rule states, in pertinent part:

> On motion and upon such terms as are just, the Court *may* relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ***(4) the judgment is void; *** The motion shall be made within a reasonable time....

(Emphasis added.)

Rule 60(b) therefore is not mandatory; the use of the word "may" demonstrates that it is permissive in nature. "Motions pursuant to rule 60(b) are addressed to the sound discretion of the district court. [Citation omitted]. Such decisions of a district court may be overturned on appeal if there is abuse of discretion under the circumstances of each individual case." *Dugan v. United States*, 521 F.2d 231, 233 (5th Cir. 1975). Thus, the Court's inquiry is two-fold: first, whether the Stay Order was "void," and second, if it was, whether the Bankruptcy Court abused its discretion in failing to vacate that Order. Those questions are treated in inverse order below.

A. *The Bankruptcy Court Did Not Abuse its Discretion in Refusing to Vacate the Stay Order.*

At the hearing on Petitioner's Rule 60(b) Motion, held on the day of the scheduled foreclosure sale, the Court was careful to expressly note that the motion had been filed the previous day at 4:46 p.m. Transcript of

Hearing, p. 14 (hereinafter cited as "T. ___"). Petitioner's counsel admitted at the hearing that shortly after the Stay Motion was filed, and certainly before the hearing on the Stay Motion itself, Petitioner was on notice of the defect of which Petitioner now complains. T. 15. In response to that admission, the Bankruptcy Court noted that the Petitioner had remained silent for over a month thereafter, waiting until 4:46 p.m. on the day before the foreclosure sale to file a motion to vacate the Stay Order. *Id.*

It is clear from the following statements made by the Bankruptcy Court at the hearing that it exercised its discretion carefully and deliberately:

(1) Petitioner's counsel of record had notice of the hearing date but took no steps to bring the alleged service defect to the Court's attention. *Id.* at 12.

(2) Petitioner's counsel allowed the Court to go forward with the hearing on the Stay Motion and to enter the Stay Order without bringing the problem to the Court's attention, resulting in Respondent advertising for foreclosure and incurring legal expenses. *Id.*

(3) There was an unreasonable delay in bringing the matter before the Court. *Id.* at 31.

(4) There was notice to Petitioner's counsel of record. *Id.* at 32.

(5) The general partner of Petitioner had actual notice prior to the hearing on the Stay Motion. *Id.*

(6) The Stay Order became final through the passage of time and nothing was done to raise the objection. *Id.*

(7) It was only at "the eleventh hour and fifty-ninth minute, the day before foreclosure, that the motion is

filed. I raise that point because there is a question of a good faith proceeding here. That's all I'm going to say about it." *Id.*

These findings were incorporated in the written order subsequently entered by the Bankruptcy Court. *See* Petitioner's Appendix 5.

Not only did the Bankruptcy Court act well within its discretion in denying Petitioner's Rule 60(b) Motion, but Petitioner filed that motion as an improper substitute for its failure to file a notice of appeal. Thus, even if the Stay Order were void, the Bankruptcy Court acted properly in denying the motion to vacate that order.

B. *Petitioner Does Not Argue That the Stay Order Was Void.*

It is instructive to note that Petitioner's argument at pp. 9-14 of its Petition goes only to the propriety of the service and notice of the Stay Motion. In effect, Petitioner treats this proceeding as an appeal from the Stay Order. As stated *supra*, that approach is incorrect as a matter of law. The Stay Order is final and unappealable. The question is whether that order may be vacated under Rule 60(b)(4), which requires that the order be "void." Petitioner does not argue that the Stay Order is void.

In effect, Petitioner side-steps that issue by focusing on whether Respondent complied with all the procedural requirements of a particular bankruptcy rule. *See* Petition, pp. 10-13. That analysis might be relevant if this were an appeal from the Stay Order, but that is not the case here. Petitioner does not argue, much less demonstrate, that the alleged non-compliance with the bankruptcy rule renders the Stay Order void. That is a threshold inquiry

which Petitioner fails to address. Petitioner clearly is attempting to use Rule 60(b) to appeal from a non-appealable order.

C. *Petitioner Received More Than Adequate Notice of the Hearing on the Stay Motion.*

1. Bankruptcy Procedure

Before addressing Petitioner's argument that it received inadequate notice of the hearing on the Stay Motion, it is necessary to review certain aspects of bankruptcy procedure. Proceedings in bankruptcy can generally be divided into three types: (i) "adversary proceedings" which are governed by Part VII of the Bankruptcy Rules; (ii) administrative matters in which there is no adverse party; and (iii) "contested matters" which do not qualify as adversary proceedings because they are not defined as such by Bankruptcy Rule 7001 but in which there are two parties who are opposing each other with respect to relief sought by one of them. 9 COLLIER ON BANKRUPTCY ¶ 9014.03.

Adversary proceedings are specifically limited to the proceedings set forth in Bankruptcy Rule 7001. These are full-fledged lawsuits which take place within a bankruptcy case. Adversary proceedings, unlike contested matters, require issuance of a summons and service of process much like a lawsuit filed pursuant to the Federal Rules of Civil Procedure. *See* Bankruptcy Rule 7004(a).

A contested matter, however, is a fundamentally distinct proceeding; contested matters are governed by Bankruptcy Rule 9014. A motion for relief from stay is a contested matter and is to be made in accordance with Bankruptcy Rule 9014. *See* Bankruptcy Rule 4001(a)(1); *see*

also, Advisory Committee Notes to Bankruptcy Rules 7001 and 9014. Relief in a contested matter is requested by motion, not by complaint. Bankruptcy Rules 9014 and 4001. No response is required to the motion. *Id.* Perhaps most importantly, summons does not issue in a contested matter; instead Rule 9014 requires only that "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."

Petitioner cites *In re Brown*, 7 B.R. 486 (Bkrtcy. N.D. Ga. 1980) and *In re Valeu*, 53 B.R. 549 (Bkrtcy. D.N.D. 1985) for the proposition that service of process on the defendant's attorney but not on the defendant himself resulted in a lack of jurisdiction over that party. It is important to note that both those cases involved adversary proceedings, not contested matters.

2. Petitioner's Due Process Rights Were Not Violated.

Petitioner queries, as one of the "Questions Presented," whether the Bankruptcy Court had sufficient jurisdiction over Petitioner for purposes of the Stay Motion. Nevertheless, at page 13 of the Petition, Petitioner admits that in motion practice, issues of "in personam" and "in rem" jurisdiction are irrelevant. Instead, Petitioner contends the question is whether it received sufficient notice to satisfy due process. The following undisputed facts should be reiterated:

(a) The Stay Motion and the notice of hearing thereon were served upon Petitioner's counsel in a timely and otherwise proper manner.

(b) The secretary of Petitioner's corporate general partner received actual notice of the motion and hearing at least three days prior to the hearing.
(c) Petitioner's counsel of record and the president and secretary of its corporate general partner were all attorneys in the same firm who occupied the same floor in the same building.

Petitioner's attempt to implicate the due process clause of the United States Constitution must be examined in light of those facts.

As stated in the rule which governs motions for relief from stay, Bankruptcy Rule 9014, the inquiry is whether reasonable notice and opportunity for hearing on the Stay Motion were afforded to Petitioner.

It is true that Bankruptcy Rule 9014 provides that a motion in a contested matter "shall be served in the manner provided for service of a summons and complaint by Rule 7004." It is equally true that Rule 7004(b)(9) provides that service upon the debtor may be made by sending the papers by first-class mail to the debtor and, if the debtor is represented by an attorney, to the attorney. Rule 7004(b)(9) thus covers both the manner of service (first-class mail) and the persons to be served. The governing rule, however, Rule 9014, requires only that a motion shall be served in the *manner* provided by Rule 7004. Rule 9014 therefore does not explicitly require service of the motion upon both the debtor and its counsel; the Rule refers simply to the manner of service, *i.e.*, first-class mail.

Petitioner admits that its attorney was served with notice of the Stay Motion. Petition, p. 10. It argues, how-

ever, that simply because the Petitioner's general partner and its attorney of record occupied the same floor in the same law firm, that does not guarantee that Petitioner itself would receive notice. *Id.* at 12. Petitioner complains of the lack of evidence showing that its counsel actually conferred with it. *Id.* Petitioner then argues that the resulting question is whether Petitioner had sufficient notice to satisfy the requirements of due process. *Id.* at 13.

Petitioner thus argues that because notice was served only upon its counsel of record, and not upon Petitioner itself, Petitioner was denied due process of law. That argument is belied by Fed.R.Civ.P. 5(b), which states, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." When this Court approved that rule, it presumably believed that rule complied with the requirements of due process of law. Petitioner cites no authority, and it is safe to assume there is none, for the proposition that the movant on a motion must prove that the respondent's counsel conferred with the respondent before the requirements of due process can be deemed satisfied.

A holding that provision of notice of a motion only to a party's counsel of record is insufficient to satisfy the requirements of due process would be tantamount to a holding that Rule 5(b) and its state counterparts are unconstitutional. Such a holding also would jeopardize the validity of the thousands of orders and judgments which have been entered after service of a motion only upon a party's counsel of record. Were Petitioner's argument to be accepted, every party who has suffered the entry of an

order or judgment after service of a motion only upon its counsel would now be free to file a motion to vacate that order or judgment.

III. THE ELEVENTH CIRCUIT'S DECISION CONFORMS WITH THE POLICY OF THE BANKRUPTCY RULES

The rule which governs contested matters, Bankruptcy Rule 9014, sets forth the standard governing the type of notice which must be afforded to an adverse party: "reasonable notice and opportunity for hearing." It is fair to assume that over the years thousands of dispositive orders and judgments have been entered after notice provided only to a party's counsel of record. In this instance, not only was sufficient notice admittedly received by Petitioner's counsel of record, but Petitioner's general partner and its counsel occupied the same floor of the same building and were members of the same law firm. A grant of certiorari in this case would not advance the interests of justice; it would, instead, invite a retreat to medieval pleading and practice rules.

CONCLUSION

There is no dispositive conflict between the decisions of the Eleventh Circuit and the decisions of any other jurisdiction. Given the applicable state law, the courts in the other jurisdictions referred to by Petitioner would have reached the same result as did the Eleventh Circuit.

Conspicuously and fatally absent from Petitioner's argument is any contention that the alleged non-compliance with the bankruptcy rules rendered the Stay Order void. In any event, the Bankruptcy Court acted within its discretion in denying Petitioner's motion to vacate the

Stay Order. Not only is there more than sufficient evidence to justify the Bankruptcy Court's decision, but that court carefully expressed its reasons for exercising its discretion in favor of Respondent. Petitioner's position in this case ultimately rests upon the proposition that notice of a motion only to a party's counsel of record is so fundamentally insufficient as to deny the party due process of law. That argument lacks both foundation and logic.

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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